

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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RICHARD HUEBNER,

Plaintiff,

v.

GOLDMAN SACHS and BANK OF NEW
YORK MELLON,

Defendants.

Case No. 2:13-CV-00255-APG-PAL

**ORDER GRANTING MOTION TO
DISMISS FOR FAILURE TO STATE
A CLAIM UPON WHICH RELIEF
CAN BE GRANTED**

Currently before the Court is Defendants Goldman Sachs' ("Goldman") and Bank of New York Mellon's ("BNY") (collectively, "Defendants") Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted. (ECF#5.)

BACKGROUND

On September 1, 2005, Plaintiff Richard Huebner ("Plaintiff") purchased the real property located at 8960 Lansberry Court, Las Vegas, NV 89147 ("Property"). (ECF#5-1 at 2.) Plaintiff financed this purchase through a mortgage loan in the amount of \$522,400 ("Loan") from Greenpoint Mortgage Funding, Inc. (*Id.*) Under the Deed of Trust, Marin Conveyancing Corp. acted as trustee for the Loan, while Mortgage Electronic Registration Systems, Inc. ("MERS") was the beneficiary. (*Id.* at 2.) On October 24, 2011, MERS assigned the Deed of Trust to Bank of America. (ECF#5-2.) On January 11, 2013, Bank of America assigned the Deed of Trust to U.S. Bank National Association. (ECF#5-3.)¹

¹ Although Defendants do not provide the Court with a link in the chain of assignments from U.S. Bank to Defendants, the Court nevertheless accepts as true Plaintiff's allegations that at some

On January 24, 2013, Plaintiff sued Defendants in Nevada state court (Case No. A-13-675567-C) seeking damages and equitable relief. (ECF#1-1 at 2-4). The suit was subsequently removed to this Court. Plaintiff asserts two claims in his Complaint: intentional misrepresentation and negligent misrepresentation. (ECF#1-1 at 3, ¶ 3.) Plaintiff also seems to argue that his Loan debt was satisfied because his mortgage was pooled and securitized. (ECF#1-1 at 3, ¶¶ 4(2) and 4(3).) Plaintiff asks for “reconveyance of [the Property] free of levy and lien, and equitable relief of \$273,687.00 plus incurred legal fees.” (ECF#1-1 at 3, ¶ 5.)

On February 21, 2013, Defendants filed a Motion to Dismiss (“Motion”). (ECF#5.) For the reasons discussed below, the Court now grants Defendants’ Motion.

DISCUSSION

A complaint must provide “[a] short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 129 S. Ct. at 1949 (internal citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering a motion to dismiss. First, the court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 1950. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.* at 1949. Second, the Court must consider whether the

point, Goldman became the beneficiary under the Deed of Trust and BNY became the trustee under the Deed of Trust. (ECF#1-1 at 3, ¶ 4(2).)

1 factual allegations in the complaint allege a plausible claim for relief. *Id.* at 1950. A claim is
2 facially plausible when the complaint alleges facts that allow the court to draw a reasonable
3 inference that the defendant is liable for the alleged misconduct. *Id.* at 1949. Where the
4 complaint does not permit the court to infer more than the mere possibility of misconduct, the
5 complaint has “alleged—but not shown—that the pleader is entitled to relief.” *Id.* (internal
6 quotation marks omitted). When the claims in a complaint have not crossed the line from
7 conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570.

8 “Generally, a district court may not consider any material beyond the pleadings in ruling
9 on a Rule 12(b)(6) motion. ... However, material which is properly submitted as part of the
10 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner*
11 *& Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir.1990) (citations omitted). Similarly, “documents
12 whose contents are alleged in a complaint and whose authenticity no party questions, but which
13 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion
14 to dismiss” without converting the motion to dismiss into a motion for summary judgment.
15 *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.1994).

16 A. Quiet Title

17 Although Plaintiff has not expressly pled a claim for quiet title, the Court infers that
18 Plaintiff is asserting that claim based on his vague allegations and prayer for relief. Specifically,
19 Plaintiff seems to claim that his debt under the Note and Deed of Trust was satisfied because his
20 mortgage loan was pooled and securitized. (ECF#1-1 at 3, ¶¶ 4(2) and 4(3).) His request for
21 “reconveyance of [the Property] free of levy and lien” seems like a demand for quiet title.
22 (ECF#1-1 at 5). “A quiet title action requests a judicial determination of all adverse claims to
23 disputed property.” 65 Am. Jur 2d. Quieting Title and Determination of Adverse Claims § 1. In
24 Nevada, “[a]n action may be brought by any person against another who claims an estate or
25 interest in real property, adverse to him, for the purpose of determining such adverse claim.”
26 NRS § 40.010.

1 The burden of proof in a quiet title action rests with the plaintiff to prove good title in
2 himself. *See Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 918 P.2d 314, 318 (Nev.1996).
3 Thus, in order to obtain title to the Property “free of levy and lien” as Plaintiff requests, Plaintiff
4 must prove that the Deed of Trust lien has been properly extinguished—that is, by payment of the
5 underlying Loan or by operation of law. Plaintiff’s Complaint does not make out a plausible case
6 for either scenario.

7 Plaintiff fails to allege that he paid off his Loan. Plaintiff vaguely suggests in his
8 Complaint that the debt was satisfied because the Deed of Trust “was pooled and securitized in[to
9 a] trust....” (ECF #1-1 at 3, ¶ 4(2).) He also claims to have “documentation verifying
10 satisfaction of said [Deed of] Trust.” (*Id.*) Such conclusory allegations, without more, are not
11 sufficient to make out a plausible claim that the debt has been satisfied or extinguished by
12 operation of law. *Iqbal*, 129 S. Ct. at 1949. Therefore, Plaintiff’s demand for conveyance of the
13 Property “free from levy and lien” fails under Rule 8(a).

14 The Court dismisses this claim without prejudice. Plaintiff may attempt to amend his
15 Complaint to include sufficiently detailed factual allegations that the Deed of Trust has been
16 extinguished as a matter of law.

17 **B. Intentional Misrepresentation**

18 Plaintiff appears to contend that Defendants misrepresented ownership of the Deed of
19 Trust. (ECF #1-1 at 3, ¶ 4(4) and 4(5).) To state a claim for fraudulent misrepresentation in
20 Nevada, a plaintiff must allege that (1) defendant made a false representation; (2) defendant knew
21 or believed the representation to be false; (3) defendant intended to induce plaintiff to rely on the
22 misrepresentation; and (4) plaintiff suffered damages as a result of his reliance. *Barmettler v.*
23 *Reno Air, Inc.*, 114 Nev. 441, 956 P.2d 1382, 1386 (1998). In addition, Rule 9 requires a party to
24 “state with particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b). This
25 particularity requires “an account of the time, place, and specific content of the false
26 representations, as well as the identities of the parties to the misrepresentations.” *Swartz v.*
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1 *KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007); *see also Morris v. Bank of Nev.*, 886 P.2d 454,
2 456 n.1 (Nev. 1994).

3 Plaintiff's claim for misrepresentation fails because it was not pled with specificity as
4 required by Rule 9(b). Nowhere in the Complaint does Plaintiff allege who made the fraudulent
5 statements, when the statements were made, or where they were made. Plaintiff also fails to
6 allege the specific content of the fraudulent statements—his allegations include only broad
7 generalizations. Plaintiff also fails to identify precisely what reliance Plaintiff placed on the
8 "misrepresentations" such that he is entitled to damages or equitable relief.

9 For example, paragraph 4 of the Complaint alleges that he "had a justified reliance on
10 truthfulness of ownership and proper assignments which was misrepresented by defendant's
11 account of ownership beneficiary through endorsements, assignments, and Notice of Default."
12 (ECF#1-1 at 3, ¶ 4(4).) Plaintiff makes no factual allegation about who, when, or how
13 Defendants intentionally misrepresented their "account of ownership beneficiary." Instead,
14 Plaintiff seems to allege only that he was somehow misled by his reading of documents
15 purporting to assign the beneficiary's interest in the Loan to Defendant. Plaintiff fails to indicate
16 what specific content within any of those documents constituted false representations, and how
17 they were false. Even assuming that Plaintiff has a justifiable reliance on the "truthfulness of
18 ownership and proper assignments," Plaintiff has failed to articulate what damages flow from the
19 alleged untruthfulness of ownership and improper assignments, assuming there were any of
20 either.

21 Moreover, on the basis of the factual allegations in the Complaint, it is difficult to
22 understand how Plaintiff could have justifiably relied to his detriment on any alleged
23 misrepresentations in the loan documents. The Deed of Trust states that it and the Note "could be
24 sold one or more times without prior notice to [Plaintiff]." (ECF#5-1 at 12-13, ¶ 20.) Plaintiff
25 signed the Deed of Trust, thereby accepting any assignment to a subsequent purchaser of the
26 Note. (ECF#5-1 at 15.)
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1 Similarly, it is difficult to determine how Plaintiff could have justifiably relied on any
 2 representations made in connection with the Loan's subsequent pooling and securitization. He
 3 was not a party to those subsequent agreements, so no representations could have been made to
 4 him. Even if misrepresentations were made in those agreements, Plaintiff has not shown how
 5 those misrepresentations caused him any harm. Moreover, if he defaulted on his Loan
 6 obligations, the beneficiary under the Deed of Trust could exercise its rights to foreclose. Thus, it
 7 is difficult to see how Plaintiff could have suffered any loss due to any misrepresentations
 8 contained in those agreements.

9 Because Plaintiff has failed to specifically plead facts sufficient to meet Rule 9(b)'s
 10 standard, the Court dismisses Plaintiffs' intentional misrepresentation claim, without prejudice.
 11 Plaintiff will have one opportunity to amend his Complaint to include sufficiently detailed factual
 12 allegations to satisfy Rule 9(b) and demonstrate the who, what, when, where, why and how of his
 13 claim for intentional misrepresentation.

14 **C. Negligent Misrepresentation**

15 Plaintiff also nakedly asserts a claim for "negligent misrepresentation." (ECF #1-1 at 3,
 16 ¶ 3.) This appears to be an alternative claim for relief, as he offers no facts to support this claim,
 17 other than those alleged in support of his claim of intentional misrepresentation.

18 In *Barmettler v. Reno Air, Inc.*, the Nevada Supreme Court adopted the definition of
 19 negligent misrepresentation from the Restatement (Second) of Torts § 552:

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 21 One who, in the course of his business, profession or employment,
 22 or in any other action in which he has a pecuniary interest, supplies
 23 false information for the guidance of others in their business
 24 transactions, is subject to liability for pecuniary loss caused to
 them by their justifiable reliance upon the information, if he fails to
 exercise reasonable care or competence in obtaining or
 communicating the information.

25 114 Nev. 441, 956 P.2d 1382, 1387 (1998). This federal district recognizes that negligent
 26 representation sounds in fraud, triggering the requirement under Rule 9(b) that the circumstances
 27 constituting fraud or mistake must be stated with particularity. See *Larson v. Homecomings Fin.*,
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1 *LLC*, 680 F. Supp. 2d 1230, 1234 (D. Nev. 2009) (plaintiffs' claim for negligent
2 misrepresentation failed because it was not pled with specificity under Rule 9(b)); *Kennedy v.*
3 *Carriage Cemetery Servs., Inc.*, 727 F. Supp. 2d 925, 931 (D. Nev. 2010); *Weingartner v. Chase*
4 *Home Fin., LLC*, 702 F. Supp. 2d 1276, 1291 (D. Nev. 2010); *G.K. Las Vegas Ltd. P'ship v.*
5 *Simon Prop. Grp., Inc.*, 460 F. Supp. 2d 1222, 1244 (D. Nev. 2006).

6 As discussed above, Plaintiff fails to plead what information Defendants conveyed to him
7 that was false, and how he justifiably relied upon it. Instead, Plaintiff merely alleges an element
8 of the claim: that Plaintiff justifiably relied on the truthfulness of ownership and proper
9 assignments. This does not satisfy the requirements of Rule 9(b), *Iqbal* and *Twombly*. For these
10 reasons, the claim is dismissed without prejudice.

11 12 CONCLUSION

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14 For the foregoing reasons, Defendants' Motion to Dismiss (ECF#5) is **GRANTED**.
15 Plaintiff's Complaint (ECF1-1) is **DISMISSED WITHOUT PREJUDICE**. Plaintiff shall have
16 30 days from the date of entry of this Order in which to amend his Complaint to assert sufficient
17 facts to satisfy the pleading requirements of Rule 9 and *Ibqal* and *Twombly*. Should Plaintiff not
18 file an Amended Complaint by that date, this case will be closed.

19 DATED this 5th day of November, 2013.

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23 ANDREW P. GORDON
24 UNITED STATES DISTRICT JUDGE
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